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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 18629
)	
ANTONIO LATIMORE,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant cannot establish that he was denied reasonable assistance of postconviction counsel when he has failed to rebut the presumption of compliance with Rule 651(c) triggered by the filing of a Rule 651(c) certificate.

¶ 2 Defendant, Antonio Latimore, appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). On appeal, defendant contends that postconviction counsel provided unreasonable assistance in violation of Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because she failed to present his contentions to the court by either adopting defendant's *pro se* filings or amending his claims. Defendant also contends that postconviction counsel effectively acquiesced to the State's motion to dismiss. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a 1998 gunfight among defendant, codefendant Eric Hodo, and others which resulted in the death of Veronica Vardiman and the injuries of Ivory Battles. Following a bench trial, defendant was found guilty of, *inter alia*, first degree murder, attempted murder, and aggravated battery with a firearm. He was sentenced to 45 years in prison for the murder conviction and to two concurrent 6-year terms for attempted murder and aggravated battery with a firearm.

¶ 4 In affirming the judgment on direct appeal, this court rejected defendant's claim that he had not been proven guilty beyond a reasonable doubt stating, in pertinent part, that the evidence presented at trial was sufficient to support his convictions under the theories of accountability, transferred intent, and felony murder predicated on aggravated discharge of a firearm. See *People v. Latimore*, No. 1-00-0489, Order at 17-20 (2001) (unpublished order under Supreme Court Rule 23). We specifically found that, although defendant may not have intended that the victims be murdered or wounded, these consequences were the result of his firing a gun at codefendant, whom defendant knew to be armed, and the ensuing gun battle. See *Latimore*, No. 1-00-0489, Order at 18.

¶ 5 In July 2003, defendant filed a *pro se* petition for postconviction relief alleging that: the State failed to prove him guilty beyond a reasonable doubt; the State obtained his conviction through the use of perjured testimony; the State's witnesses testified inconsistently; he was denied a fair trial by the State's prejudicial remarks during closing argument; and he was denied the effective assistance of trial and appellate counsel. The circuit court summarily dismissed the petition as frivolous and patently without merit. On appeal, this court reversed and remanded the cause because the court's summary dismissal was void because it was entered more than 90 days after the petition was filed. See *People v. Latimore*, No. 1-04-0327 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 On remand, defendant's petition was docketed and postconviction counsel was appointed.

In August 2010, defendant filed an amended *pro se* petition for postconviction relief alleging that he was denied effective assistance of appellate counsel by counsel's failure to allege trial counsel's ineffectiveness and to argue that he was not proven guilty beyond a reasonable doubt. Defendant alleged, *inter alia*, that appellate counsel should have raised trial counsel's failure to object at sentencing when the trial court acknowledged that defendant lacked the intent to kill the victim.

¶ 7 On January 27, 2011, postconviction counsel filed a certificate pursuant to Rule 651(c), stating that she had communicated with defendant via telephone and letter, examined the trial record, and was not making any amendments to his *pro se* postconviction petition because no amendments were necessary for an adequate presentation of his claims. The State then filed a motion to dismiss the amended petition for postconviction relief alleging, *inter alia*, that defendant's claims were untimely and procedurally barred.

¶ 8 Defendant filed a *pro se* response to the motion to dismiss, arguing that the late filing of his postconviction petition was not due to his culpable negligence; rather, it was because he was denied access to the law library due to staffing shortages and lockdowns. The response further alleged that defendant's original petition was timely.

¶ 9 At the hearing on the State's motion to dismiss, postconviction counsel indicated that she was standing on defendant's *pro se* petition. However, she then asked the court to consider both the original and the amended petitions. Postconviction counsel also stated that with regard to timeliness, defendant had trouble accessing the prison law library due to lockdowns and that he had filed a motion for an extension of time to file his postconviction petition. In denying defendant postconviction relief, the court indicated that it had considered all of defendant's claims. The court then stated that, although the petition was untimely and procedurally barred, the court had considered defendant's claims on the merits and that those claims did not make a substantial showing of a constitutional violation.

¶ 10 On appeal, defendant contends that postconviction counsel provided unreasonable assistance under Rule 651(c) because counsel failed to present his claims to the court by either adopting his *pro se* filings or amending his claims. Defendant also contends that postconviction counsel effectively acquiesced to the State's motion to dismiss.

¶ 11 This court reviews an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on the State's motion, *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 12 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. The purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 13 When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second-stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 14 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, thus creating a presumption that defendant received the representation required by the rule at the second stage of

proceedings. *Rossi*, 387 Ill. App. 3d at 1060. However, defendant contends that he has rebutted the presumption of substantial compliance. Specifically, he contends that although he filed two *pro se* petitions for postconviction relief, postconviction counsel's Rule 651(c) certificate did not acknowledge these two petitions or indicate that counsel intended to adopt the claims of both petitions. He also contends that counsel's failure to amend his petition following the filing of the State's motion to dismiss was unreasonable because the State's arguments were partially based upon the procedural claims of untimeliness and *res judicata*.

¶ 15 Initially, we reject defendant's contention that the 651(c) certificate established that postconviction counsel failed to review both of defendant's filings as Rule 651 does not expressly require the certificate to be a comprehensive recounting of all of postconviction counsel's efforts. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 24. Here, postconviction counsel's certificate indicated that after communicating with defendant by telephone and letter and examining the trial record, counsel chose not to make any amendments to defendant's *pro se* postconviction petition because no amendments were necessary for an adequate presentation of defendant's claims.

¶ 16 Additionally, at the hearing on the State's motion to dismiss, counsel requested that the court consider the claims raised in the amended postconviction petition as well as those raised in the 2003 petition, and argued, with regard to the timeliness of the petition, that defendant had trouble accessing the prison law library due to lockdowns and had attempted to obtain an extension of time in order to file his *pro se* postconviction petition. Thus, contrary to defendant's contention on appeal, counsel did attempt to rebut the State's argument that defendant was culpably negligent. In dismissing the petition, the court specifically stated that, although defendant's petition was untimely, the court considered the merits of all of defendant's claims, *i.e.*, those contained in the 2003 petition and those contained in the amended postconviction petition. Ultimately, defendant has not overcome

the presumption that he received the representation the rule mandates during the second stage of proceedings under the Act. *Rossi*, 387 Ill. App. 3d at 1060.

¶ 17 Defendant further contends that because counsel did not present an argument in response to the State's motion to dismiss, counsel provided unreasonable representation by acquiescing to the dismissal of his claims. In other words, defendant contends that postconviction counsel's failure to explicitly adopt or argue any of his postconviction claims indicates that she believed these claims to be meritless, and consequently, her failure to file a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), constituted unreasonable assistance. We disagree.

¶ 18 In *Greer*, our supreme court stated that, although Rule 651(c) requires postconviction counsel to make any amendments necessary to a *pro se* petition, in those cases where "amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' " within the meaning of the rule. *Greer*, 212 Ill. 2d at 205. The court then noted that an attorney who determines that a defendant's claims are meritless cannot in good faith file an amended petition on that defendant's behalf. *Greer*, 212 Ill. 2d at 205.

¶ 19 In other words, although *Greer* permits withdrawal where the defendant's petition cannot be amended to state a meritorious claim, it did not create a requirement that counsel must withdraw instead of complying with Rule 651(c) and standing on the *pro se* petition. See *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (when counsel investigates a defendant's postconviction claims but finds them without merit counsel has two options: (1) stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended; or (2) withdraw; in both cases, the allegations raised in the defendant's *pro se* petition remain and proceed pursuant to the Act).

¶ 20 This court is unpersuaded by defendant's reliance on *People v. Shortridge*, 2012 IL App (4th) 100663, as in that case, postconviction counsel characterized his client's postconviction claims as "nonmeritorious." See *Shortridge*, 2012 IL App (4th) 100663, ¶ 14. On appeal, the court determined

that postconviction counsel should have filed a motion to withdraw from his representation of defendant rather than conceding that the defendant's claim were not viable. *Shortridge*, 2012 IL App (4th) 100663, ¶ 14. Here, on the other hand, defendant's postconviction counsel did not make such a concession. Rather, counsel stated that she would stand on the claims raised by defendant, requested that the court consider all of his claims, and asserted that he was not culpably negligent in the untimely filing of his petition due to prison lockdowns and difficulty accessing the prison law library. Thus, counsel's representation did not constitute unreasonable representation as in *Shortridge*.

¶ 21 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, thus triggering the presumption that defendant received the representation that the rule requires him to receive during second-stage proceedings under the Act (*Rossi*, 387 Ill. App. 3d at 1060), and, as discussed above, defendant has failed to rebut this presumption (see *Profit*, 2012 IL App (1st) 101307, ¶ 19). Consequently, defendant has failed to establish that he was denied the reasonable assistance of postconviction counsel (see *Moore*, 189 Ill. 2d at 541) and the dismissal of his petition was proper.

¶ 22 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.